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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11
12 THE CENTER FOR INVESTIGATIVE
REPORTING and JENNIFER GOLLAN,

13 Plaintiffs,

14 v.

15 UNITED STATES DEPARTMENT OF
16 LABOR,

17 Defendant.

) Case No. 4:18-cv-02414-DMR

) **SUPPLEMENTAL DECLARATION OF**
) **PATRICK J. KAPUST IN SUPPORT OF**
) **MOTION FOR SUMMARY JUDGMENT**

18
19 I, Patrick J. Kapust, declare as follows:

20 1. In its motion for summary judgment, the Center for Investigative Reporting ("CIR")
21 asserts that information collected under OSHA's rule to Improve Tracking of Workplace Injuries and
22 Illnesses (the "Regulation") is not confidential commercial information under the FOIA because OSHA
23 previously released injury and illness information collected, for example, under the OSHA Data
24 Initiative (the "ODI"). CIR also relies on statements by OSHA, during the 2016 rulemaking
25 promulgating the rule to Improve Tracking of Workplace Injuries and Illnesses (the "Regulation"), and
26 by Dr. David Michaels, OSHA's former Assistant Secretary, for example, that it had been OSHA's
27 intent to release data submitted electronically under the Regulation.

1 2. From 1997 to 2012, OSHA conducted injury and illness surveys of employers, and
2 collected establishment-specific injury and illness data, through the ODI. Typically, there were over
3 180,000 unique establishments subject to participation in the ODI. The ODI was designed so that each
4 eligible establishment received the ODI survey at least once every three-year cycle. In a given year,
5 OSHA would send the ODI survey to approximately 80,000 larger establishments (20 or more
6 employees) in selected industries. These establishments were required to participate in the survey and
7 faced potential citation and fines if they failed to comply.

8 3. OSHA's decision to release the ODI and other injury and illness information in the past
9 was premised on its understanding of then-applicable judicial precedent holding that the information
10 was not confidential commercial information under the FOIA because release of the information would
11 not cause a competitive harm to employers, under what was called the "competitive harm" prong of the
12 then-applicable legal test for determining the applicability of Exemption 4 to the FOIA. (See 81 Fed.
13 Reg. 29624, 29657-29658 (May 12, 2016) (preamble to Regulation)).

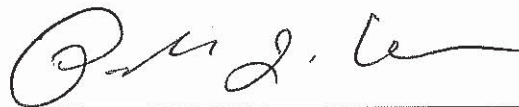
14 4. OSHA promulgated the Regulation in 2016. The Regulation requires certain categories
15 of employers to electronically submit to OSHA, on an annual basis, information from certain
16 recordkeeping forms that OSHA requires be kept by the employers, including OSHA Form 300A
17 Summary of Work-Related Injuries and Illnesses. OSHA Form 300A contains, and data collected under
18 the Regulation includes, injury and illness information.

19 5. After Dr. Michaels left the Agency in January 2017, OSHA determined, based on the
20 sustained objection to public release of the data collected under, and the lower-than-expected
21 compliance with, the Regulation (see Declaration of Patrick J. Kapust ¶¶ 12-22), that release of the data
22 submitted electronically under the Regulation would not be consistent with another prong of the then-
23 applicable test for determining the applicability of Exemption 4 to the FOIA, the "compliance and
24 program effectiveness" prong. After determining this, OSHA assessed that it could release data
25 submitted electronically under the Regulation, but only when it finished using it to target employers for
26 inspection – approximately four years after the year to which the data relates. OSHA reasoned that
27 releasing the data before OSHA finished using it to target employers for inspection would impair the

1 effectiveness of OSHA's inspection targeting programs, and releasing the data after OSHA finished
2 using it to target employers for inspection would not impair the effectiveness of OSHA's inspection
3 targeting programs.

4 6. When the Supreme Court issued its decision in *Food Marketing Institute v. Argus Leader*
5 *Media*, 139 S. Ct. 2365 (2019) ("*Argus Leader*"), OSHA had not yet implemented its intended release of
6 data that was approximately four years old, and based on *Argus Leader*, determined that release of the
7 300A data submitted under the Regulation would not be consistent with the new test established by that
8 decision for determining the applicability of Exemption 4 to the FOIA. OSHA has not yet determined
9 how, or whether, *Argus Leader* impacts the ultimate release of the data (for example, whether *Argus*
10 *Leader* prevents release of the data even when OSHA finishes using it to target employers for inspection
11 – approximately four years after the year to which the data relates).

12 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and
13 correct hereto. Executed this 5th day of November, 2019.

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15 PATRICK J. KAPUST
16 Acting Director, OSHA Directorate of
17 Enforcement Programs
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